

**REPORT**  
OF  
**THE COMMITTEE**  
OF THE  
**MONTREAL BAR,**

ON THE PROJECT OF  
**THE JUDICATURE ORDINANCE,**

ADOPTED BY THE BAR ON THE 16TH APRIL, 1840.

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**RAPPORT DU COMITÉ**  
DU

**BARREAU DE MONTREAL,**

SUR LE PROJÈT

**d'Ordonnance de Judicature,**

ADOPTÉ PAR LE BARREAU LE 16 D'AVRIL, 1840.

IMPRIMÉ PAR LOUIS PERRAULT



AT A MEETING of the Members of the Montreal Bar, called by F. X. BENDER, Esquire, *Doyen*, held in their Chambers in the Court House, in this City, on Saturday, the 11th April, instant, to take into consideration the draft of an Ordinance of Judicature which His Excellency the Governor General is about to submit to the Spécial Council,

J. D. LACROIX, Esquire, having been unanimously called to the Chair, and J. G. BARTHE, Esquire, requested to act as Secretary, it was

On motion of CHARLES MONDELET, Esquire, seconded by L. H. LAFONTAINE, Esquire,

*Resolved*, 1. That a Committee of seven members be named, to take into consideration the draft of an Ordinance of Judicature which is about to be submitted to the Spécial Council, and to report on Tuesday next, the 14th instant, at 3 o'clock, P. M. their views, suggestions, and observations relative to the said draft, and that Messrs. LAFONTAINE, SMITH, MONDELET, T. PELTIER, WALKER, GUY and FISHER, do compose the said Committee.

On motion of L. H. LAFONTAINE, Esquire, seconded by J. SMITH, Esquire.

*Resolved*, 2. That the Chairman of this meeting be requested to transmit a copy of its proceedings, to each of the *Doyens* of the Quebec and Three-Rivers' Bars, for the information of their respective members.

The meeting was then adjourned to Tuesday the 14th instant.

By order of the Chairman.

J. G. BARTHE.

# AT A MEETING

OF

THE MEMBERS OF THE BAR OF THIS CITY,

HELD AT THE COURT-HOUSE ON THE 16th INSTANT,

J. D. LACROIX, ESQ. BEING CALLED TO THE CHAIR, AND  
J. G. BARTHE, ESQ. ACTING AS SECRETARY,

**THE COMMITTEE**

OF

**THE MONTREAL BAR,**

ON

THE PROJECT OF THE JUDICATURE ORDINANCE,

TO BE SUBMITTED TO THE

**SPECIAL COUNCIL,**

**PRESENTED THE FOLLOWING REPORT,**

WHICH WAS READ

IN ENGLISH BY W. WALKER, ESQ. CHAIRMAN OF THE COMMITTEE,  
AND IN FRENCH BY C. MONDELET, ESQ.

*The Committee appointed by a Resolution of the Bar  
of the 11th instant, have the honour to report as  
follows:—*

THE project of Law which the Committee have been called upon to examine, deserves a very general and anxious attention. It assumes the provisions of law under which the existing Courts of Judicature have been established, to be altogether insufficient and inadequate for the due administration of justice. It affects the Judicial system of the Province in all its higher departments. It abrogates the existing Courts of King's Bench for the Districts of Quebec, Montreal, Three-Rivers, and St. Francis, the Court for the Inferior District of Gaspé, and the Provincial Court of Appeals. It abolishes the existing division of the Province into Districts; the various Courts of King's Bench throughout the Province, are to be superseded by a Court of Common Pleas, sitting by divisions in the Districts to be erected by the Bill; and the Provincial Court of Appeals is to be replaced by a Supreme Court of Record, to be called the Court of Queen's Bench, possessing all the powers of the present Court of Appeals, the high and transcendent authority of the Court of Queen's Bench in England, and having original and exclusive criminal jurisdiction throughout the Province. It is only within the last few days that the details of a project involving changes and alterations so important, and remodeling the constitution of the higher tribunals throughout the Province, have been accessible to the members of the Profession. That there are many and serious deficiencies in the existing system, your Committee will not undertake to deny; but they most respectfully conceive that any expedient intended to supply such deficiencies, should have been preceded by many formalities and enquiries; that the evils and their causes should have been investigated and reported upon, and that the remedy ought to have been one suggested by the opinions of able men in various departments, including the Judges of the different Courts and the Professors of the Law.

The issue is between the framer of the measure and the system which it is now proposed to subvert. In the opinion of your Committee the measure will prove wholly inadequate to the purposes intended. It will increase the expenses attendant upon the administration of Justice. It will place a majority of the Judges of the land in a novel and degrading position. It will detract from the consideration they have hitherto enjoyed. It will render their decisions liable to review by a Court composed of Professional men like themselves, fewer in number, probably not their superiors in talent, integrity, or legal knowledge. And it will confer upon a very few men judicial powers, unlimited in extent, and in their exercise not unlikely to prove dangerous to the rights of property and the welfare of the community.

It is the opinion of your Committee that ere a change so sweeping be submitted to the consideration of the Legislature, inquiry should be directed to determine the measure and extent of the evils complained of, and the most efficient means of redress.

Your Committee are opposed to the abolition of the existing Districts. They see no reason to disturb the present divisions of the Province, unless it should be considered expedient to reunite the District of St. Francis to that of Three-Rivers.

They do not perceive the necessity of abrogating the present Courts of King's Bench, or of separating the Criminal from the Civil Jurisdiction,—of withdrawing from these Courts any of the powers, authority and jurisdictions which they now exercise. They recognize the propriety of abolishing the present Court of Appeals, but they are opposed to the creation of a legal tribunal as a Court of Supreme Appellate Jurisdiction throughout the Province, composed of members other than the Judges in the Courts of Original Jurisdiction. They cannot recognize the policy or the wisdom of the project which would create two distinct legal tribunals, composed exclusively of Lawyers, with power to the one, to control and revise the decisions of the other, and this under circumstances which would imply no superiority of talent, intelligence or legal knowledge, on the part of the men by whom this appellate jurisdiction would be exercised. They see not the propriety of creating two Courts so wholly differing from each other in rank and authority, however it may be permitted to some Judges to enjoy a pre-eminence in their respective Courts. Wherever unlimited and supreme original jurisdiction is confided to a Court, the inference is unavoidable, that its members are not unworthy of the trust, and if it be judged fitting that its decisions should, in certain cases, be liable to revision by means of an appeal, the power of revision and control should not be committed to a body of Judges in no other respects distinguished from the men whose judgments they are called upon to revise, than by an artificial distinction of rank.

The province of a Court of Appeals is not to try the cause, but the justice of the sentence appealed from. What assurance is offered to the public that the opinion of the two or three Judges who are to constitute the proposed Court of Queen's Bench, will be more matured or more entitled to respect, than the opinions of the Judges by whom the sentence was first pronounced? Will the mere fact of assigning to this Court of Queen's Bench certain attributes and a certain authority, render that Court morally and intellectually superior to the Court whose judgments it is authorised to pass in review?

Should it be deemed advisable that the judgments of lawyers should be passed in review by other lawyers, your Committee would direct attention to the practice in the Court of Exchequer

Chamber in England. Into this Court, consisting of all the Judges of the three Superior Courts, are frequently adjourned from the Court of King's Bench, Common Pleas and Exchequer, such causes as upon argument appear to require a solemn and deliberate expression of opinion from all the Judges of the land. This course of proceeding is not strictly in the nature of an appeal, but it tends to restrain the frequency of appeals to the House of Lords, which in all dubious cases, refers itself to the opinions of the Judges who are summoned by writ to advise them.

From the decisions of the three Sovereign Courts in Scotland, an appeal lies to the House of Lords; the jurisdiction of the Court of Session or College of Justice in that country in civil matters is unlimited in extent and supreme in degrees. Its judgments are subject to the review of no Court, save that of the House of Lords. But the frequency of appeals was guarded against, and in some measure restrained by the power which it exercised of reducing its own decrees.

The project which your Committee have been required to examine, substitutes to the present Court of Appeals, a tribunal composed of a Chief Justice of the Province and two Puisne Judges. The creation of such a Court for the purpose of revising and controlling by way of appeal the judgments of the Court of Common Pleas, would, in the estimation of all men, imply a marked distrust of the competence of the Judges of the Court of Common Pleas, adequately to perform the duties assigned to them, and rather than reduce the weight which ought properly to attach to their decisions by inviting appeal to another tribunal, it appears to your Committee that the interest of the public would be best consulted by abstaining from the creation of any Court of Common Pleas, or any other Court subordinate to the proposed Court of Queen's Bench, and conferring upon this latter tribunal, not an appellate, but an original jurisdiction in civil matters. Under the system as proposed, the institution of an action at law before the Court of Common Pleas, will be regarded in the greater number of cases, as the first initiative step in the progress of a legal proceeding to secure to the parties a sentence or judgment of the Court of Queen's Bench, as the only Court whose opinion can be looked up to with reverence and respect. The Judges of the existing Court of King's Bench have hitherto been regarded as the highest Judicial functionaries of the Province. They enjoy a rank which confer upon them consideration in the eyes of the public, and which attaches a dignity to their concerns. They administer Criminal as well as Civil Justice. As Judges of the Court of Common Pleas by which the existing Courts of King's Bench are to be superseded, they will succeed to a militated and diminished authority.

The Criminal jurisdiction is withdrawn. Many of the more important attributes of the Court of King's Bench are denied to it, and its judgments are liable to review by another authority.

As the Courts are now constituted, no member of the legal profession would venture to accept the office of Judge, who was imperfectly qualified for its duties. But once apparent that the business of the Court of Common Pleas consists in maturing cases for the decision of a higher tribunal, it will cease to be matter of interest to the country by whom the functions of the Court are performed.

As already mentioned, the proposed Court of Queen's Bench is to consist of the Chief Justice of the Province and two Puisne Judges, and the attention of your Committee has been forcibly drawn to that provision of the Bill which declares that two of the Justices of the Court of Queen's Bench shall constitute a quorum, and that when only two of such Justices shall be present, and be divided in their

opinion, the Chief Justice, if present, shall have a double or casting voice. Your Committee would remark, that in no judicial system with which they are acquainted, is such a regulation to be found. In affairs of legislation, a double or casting vote may not be unknown; but upon no principle of policy or justice can such a power be lodged with the President of a Court.

Should the proposed measure become a law, it is more than probable that to the division which embraces the City of Montreal and the surrounding country, four Judges of the Common Pleas will be assigned. The decisions of these men are liable to be passed in review by any two of the Justices of the Queen's Bench; and it must unavoidably occur that in the event of a difference of opinion, the double or casting voice of the Chief Justice, or in other words, the unsupported opinion of one Judge enjoying no superiority over another, except what is conferred by pre-eminence in rank, will have the effect of vetoing the opinion of his associate Judge, and of reversing the decisions of four Judges in another tribunal, selected, like himself, from the legal profession. Should the principle involved in the judgment appealed from, be one consecrated by the decisions of all the Judges of the Court of Common Pleas throughout the Province, in their various divisions, the enormous powers thus vested in the President for the time being, of the Court of Queen's Bench, would enable him to overthrow the established jurisprudence of the country.

In the exercise of the criminal jurisdiction to be committed to the Court of Queen's Bench, there may also arise a difference of opinion; the same power will be brought into requisition; and the life, the liberty or the character of any member of society may be sacrificed to the opinion of one man, in his own person not exempt from the common fallibility of our nature.

Your Committee challenge the annals of Justice in all civilized communities to exhibit any proof of a double or casting vote being permitted in Courts of Justice. The Speaker of the House of Lords, whether acting in a legislative or judicial capacity, has no casting vote, but his vote is collected with the rest of the House. Hence the order of putting questions in appeals and writs of error is this: "Is it your Lordship's pleasure that this decree of judgment shall be reversed." If the votes are equal, the judgment of the Court below is affirmed. In the Superior Courts, if the Judges are equally divided there is no decision, and the judgment is suspended, until a majority concur.

For the reasons assigned, your Committee equally denounce that provision which gives to the President of a division of the Court of Common Pleas, in the event of a difference of opinion, a double or casting voice.

It would be unjust to deny that the proposed measure embodies some enactments eminently calculated to facilitate the administration of justice. The extension of the trial by Jury, the introduction of Criminal Courts or Courts of Assize, and Courts of *Nisi Prius*, are measures with respect to which a nearly perfect unanimity of opinion will be found to prevail.

Upon the whole, it is the opinion of your Committee that the existing divisions of the Province into Districts should be retained, and that the Courts of King's Bench should not be superseded by any other tribunal; that they should continue to exercise all the powers and functions hitherto attributed to them by law, with certain exceptions, and subject to those alterations in the system of administering justice throughout the Province, which the necessities of the country imperiously demand.

The Judges of the Courts alluded to, particularly in the large and populous District of Montreal, have been silently labouring for years under their growing burthens; the business of the Court of King's Bench for this District is largely in arrear, and this partly in consequence of the nature and extent of the duties which the Judges are called upon to discharge, and partly from defects of the existing system; it is most desirable, in the opinion of your Committee, that the Judges of the Court of King's Bench should be relieved from the cognizance of all matters under £10 stg. that they should cease to exercise Inferior Jurisdiction in any cases whatsoever, and that they should also be relieved from the greater share of the ministerial duties hitherto imposed upon them.

There can be but one sentiment in the opinion of your Committee with respect to the propriety of awarding trials by Jury at the option of either of the parties in all actions but in those of a real or mixed nature.

The observations which have fallen from your Committee in animadverting upon the constitution and character of the Court of Appellate Jurisdiction proposed to be created by the measure in question, indicate, that in their opinion, the present Court of King's Bench throughout the province, afford the materials for constituting a tribunal for all purposes of Appellate Jurisdiction, more efficient in its character and more liable to command the respect and confidence of the community. They propose that in all cases where an appeal by law now lies to the Provincial Court of Appeals, it shall be competent to either of the parties to demand and obtain a rehearing and revision of the judgment by a Court of Revision to be composed of all the members of the different Courts of King's Bench throughout the Province, acting together in a collective capacity and sitting alternately at stated periods in the cities of Quebec and Montreal.

Your Committee are of opinion that a Court of Revision constituted upon this principle, will tend to give stability, consistency, and uniformity, to the administration of justice throughout the Province. It will avoid much of delay and expense, and the multiplication of proceedings, and is calculated in the opinion of your Committee to answer all the purposes of a Provincial Court of Appeals, without being obnoxious to the strong and weighty objections to which the existing system, and the one proposed as a substitute, are liable.

Your Committee deem it unnecessary to enlarge upon the objections which may be taken to any system of Judicature which establishes various gradations of Courts. It is sufficient to state that the evils of such a system have been experienced in England. It is fitting that the system to be introduced should ensure, if possible, an able and complete judgment in the first instance, and where the judgment of any of the Courts of King's Bench throughout the Province is impeached, your Committee can imagine no more satisfactory method of determining the substantial merits of the case, than by an impartial and dispassionate revision by a tribunal composed of all the Judges of the Province.

Your Committee are further of opinion that under any system to be established, it should be imperative upon the Courts of Superior Jurisdiction to embody in the judgments pronounced, the reasons or motives upon which their decisions are founded, in all cases contested, or in actions by Default dismissed.

In conclusion, your Committee beg to state, in reference to those clauses of the proposed bill which enact, that the persons to be deemed eligible as Justices in the Courts to be constituted, shall be Advocates in Lower Canada, or Barristers in England, or Barristers in Upper Canada, of not less than ten years standing, that they forbear to express at length the objections which might be justly urged to such an enactment; it is sufficient for them to state, that under any circumstances such an enactment would not only be unjust towards the Legal Profession in this Province, but injurious to the public, as conferring upon persons, strangers to the laws and institutions of the country, the power of administering justice under a system of which they must be comparatively ignorant.

The whole nevertheless respectfully submitted,

MONTREAL, 16th April, 1840.

W. WALKER, CHAIRMAN.  
Tst. PELTIER,  
CHARLES MONDELET,  
Hx. GUY,  
DUNCAN FISHER.  
JAMES SMITH,  
L. H. LAFONTAINE.

H. TAYLOR, Esquire, then moved, that the report of the Committee be adopted,

Seconded by L. T. DRUMMOND, Esquire,

C. D. DAY, Esquire, moved in amendment :

That the report of the Committee be amended, by striking out that portion which relates to the constitution of the Court of Appeal, and that there be substituted a clause of a Court to exercise an appellate and criminal jurisdiction, to consist of a Chief Justice and three Puisne Judges, to sit alternately at Quebec and Montreal,

Seconded by A. P. HARR, Esquire,

The amendment was lost by a division of 44 against 7.

C. S. CHERRIER, Esquire, then moved in amendment,

That to that portion of the Report which relates to the constitution of the Court of Revision, the following proviso be added: "provided that the Judges who had sat in the Court of Original Jurisdiction, should not sit in the Court of Revision, on judgments appealed from their Courts;"

Seconded by J. C. BRUNEAU, Esquire,

This amendment was also lost by a division of 9 for, and 43 against.

Upon Mr. TAYLOR's motion for adopting the Report, it was adopted on a division of 50 yeas and 6 nays.

Then on motion of W. C. MEREDITH, Esquire, seconded by S. C. MONK, Esquire, it was

*Resolved*, That the Report and Resolutions adopted by this meeting be inserted in the newspapers of this Province, and that 300 copies of the Report be printed, and copies transmitted by the *Doyen* to His Excellency the Governor General, to the Judges and to the Members of the Bar of the other Districts of this Province.

J. G. BARTHE,

*Secretary.*

MONTREAL, 16th April, 1840



**P R E F A C E**

OF

**THE MONTREAL BAR,**

ON THE PROPOSED

**THE JUDICATURE ORDINANCE.**

BY  
ALFRED AND JOHN ALLEN, ESQ.

**P R E F A C E**

DU

**BARREAU DE MONTREAL,**

**sur le projet**

**D'ORDONNANCE DE JUDICATURE,**

LE 16 D'AVRIL, 1840.